(3)

No. 03-686

DEC 15 2003

In The

Supreme Court of the United States

THE REPUBLIC OF HONDURAS, THE REPUBLIC OF ECUADOR and THE REPUBLIC OF BELIZE,

Petitioners,

vs.

PHILIP MORRIS COMPANIES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The dispute between the parties is clearly drawn. The Respondents assert repeatedly (31 times by our count) that this is an action "by foreign governments to enforce their tax laws" (Brief in Opposition at 2; see id. at 1-12). The Petitioners counter that this action was brought for violation of the unambiguous language of a United States criminal statute, based on the conduct primarily of United States corporations, primarily in the United States, in which one (admittedly major) element of the damages is the foreign taxes which the Respondents should have paid.

The Respondents also assert repeatedly that the permissibility of this action is "committed by the U.S. Constitution to the political branches of government" (id. at 8; see id. at 4, 5, 8, 11, 13). The Petitioners counter that it was Congress, a political branch of government, which enacted RICO, 18 U.S.C. Chapter 96, whose unambiguous language creates the cause of action asserted.

The Respondents contend that "the revenue rule was firmly established in the common law" when Congress enacted RICO (id. at 14). The Petitioners counter that whether or not the rule in concept was firmly established, the wide ambit ascribed by the Respondents has never been, and certainly has never been confirmed by this Court. Its "applicability" in the specific context at issue "has never been established with such force and clarity as to supplant Congress' plain language in enacting both the underlying criminal statutes which were violated in this case, and the RICO statute which creates the Petitioners' causes of action" (Petition at 3).

Therefore, the issues remain 1) whether the revenue rule was ever intended to prohibit actions brought by

foreign sovereigns in the United States' courts under United States' statutes, against United States corporations, for unlawful conduct occurring in the United States; and 2) even if the revenue rule should have such reach, was "its applicability" so firmly established at the time RICO was enacted as to imply Congressional intention to retain it, notwithstanding the admittedly unambiguous language of RICO?[1]

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[1] Before entering the argument, we need to correct three factual misstatements by the Respondents. First, the Amended Complaint does allege that "bank accounts in Miami, Florida owned by various RJR cigarette distributors, were frozen by United States law-enforcement officials because funds credited to those accounts represented laundered drug money" (R-98, ¶107) (compare the Brief in Opposition at 3 n. 1 ("these patently false allegations are nowhere found in the amended complaints")).

Second, the Petitioners' central argument – that the revenue rule was never intended to preclude suits against U.S. corporations for the violation of U.S. statutes – was hardly "waived by not raising it before the Court of Appeals . . ." (Brief in Opposition at 9). See Consolidated Brief of Appellants Republic of Honduras, Republic of Ecuador and Republic of Belize at 7, 8, 10, 14, 15, 16, 17, 25, Case No. 02-11735-GG, United States Court of Appeals for the Eleventh Circuit, June 10, 2002.

Third, the Petitioners' invocation of the U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, was not made for the first time in its reply brief in the appellate court (Brief in Opposition at 17). See Consolidated Brief at 30 ("The Patriot Act expands RICO, particularly as it concerns money laundering as a predicate act, 18 U.S.C. §1956(c)(7). In adopting it, the Congress rejected a rule of construction which would have expressly adopted the revenue rule"); see also id. at 30-31.

ARGUMENT

1. The Unsettled Law on the Common Law Revenue Rule. Although the Respondents have forcefully contended that the Court of Appeals made the right decision, they offer only conclusory assertions that it rests on unanimous, settled and coherent principles. As two courts have noted (see Petition at 8), the purported distinction between criminal and civil statutory prosecutions (see Brief in Opposition at 2, 10-11) is illusory, given that both are based on the decision of a political branch of government in promulgating the statute. See *United States v. Pasquantino*, 336 So.2d 321, 330-31 (4th Cir. 2003) (en banc) (quoted below); *United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996), *cert. denied*, 519 U.S. 905 (1996) ("In the end, all the arguments based on the revenue rule's functions apply, if at all, with equal force in both the criminal and civil contexts"). See also *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 139 (2nd Cir. 2001) (Calabresi, J., dissenting), *cert. denied*, 537 U.S. 1000 (2002) (majority's attempt to distinguish criminal cases necessarily "founders in the face of the Supreme Court's consistent refusal to treat criminal and civil RICO actions differently"). As noted (Petition at 2, 8, 9), contrary to the Respondents' contention (Brief in Opposition at 2), *Pasquantino* rejects any such distinction, in holding that a wire-fraud prosecution, "even when the subject . . . is certain tax revenue due a foreign sovereign, does nothing civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant," but rather "seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest . . . ." Id. at 331. These decisions alone preclude the

Respondents' claim of unanimity and coherence in the federal system. And as we noted (Petition at 10-14), this dissonance is only magnified in the context of larger doctrines of justiciability.

The Respondents find these concerns "easily disposed" (Brief in Opposition at 12), trusting in the "decisions [of] the political branches" (id. at 13) to determine when the constitutional guarantee of foreign sovereigns' access to our courts should be honored (see Petition at 11) – and with it the underlying principles of comity and reciprocity (see Petition at 11-12) – notwithstanding their acknowledgment that the "Court of Appeals never even mentions the act of state or political question doctrines" (Brief in Opposition at 13). The Respondents' confidence in such situational political decisionmaking, like its earlier confidence in the scope and logic of the revenue rule, connotes little more than faith. It provides no comfort that such weighty matters will work themselves out in the absence of this Court's guidance.

2. RICO's Unambiguous Language Preempts the Revenue Rule. The Respondents offer no disagreement that the unambiguous language of RICO creates the Petitioners' pleaded cause of action. They do not disagree that under 18 U.S.C. §1964(c), the Plaintiff Republics qualify as "person[s] injured in [their] business or property by reason of a violation of section 1962," nor that their complaints allege violations of §1962 – mail fraud, wire fraud, money laundering and conspiracy. Nor do the Respondents question the decisions of this Court holding that even a pre-existing common-law cause of action must yield to unambiguous statutory language (see Petition at 16-17). These decisions reflect the "interpretive presumption" that "Congress is understood to legislate against the

background of common-law adjudicatory principles" – a presumption which does not "entail[] a requirement of clear statement, to the effect that Congress must state precisely any intention to overcome the presumption's application to a given statutory scheme." *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citation omitted). The Respondents invoke only the qualification that "where a common-law principle is *well established* . . . the courts must take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident,'" id. at 108 (emphasis added), quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

The Respondents contend that the *Astoria* qualification is satisfied because "the revenue rule was firmly established in the common law" when Congress enacted RICO (Brief in Opposition at 14). But the question is not whether the rule was well established in concept, but rather in the particular context at issue – whether its asserted application – to pre-empt a federal statutory condemnation of conduct in the United States, in which foreign tax revenue is one measure of damages – was itself "firmly established" when RICO was enacted. As the Respondents acknowledge (Brief in Opposition at 1), before *Attorney General of Canada* in 2001, only one American court had ever enforced the rule in that context – *United States v. Boots* in 1996 (forbidding a criminal prosecution for wire fraud assertedly intended to defraud the Canadian government of tax revenues). Every other decision enforcing the revenue rule, including those cited by the Respondents (Brief in Opposition at 6-8), forbid non-statutory claims to collect foreign taxes – either

directly or indirectly. At the time RICO was enacted, no decision had held that the rule can pre-empt a federal statute. It cannot be said that Congress was legislating against a "well established" common-law doctrine which, if enforced, would provide an exception to the unambiguous statutory language it was promulgating. The Respondents' only argument – that the revenue rule in concept was well established at the time – is wholly unresponsive, and begs the two questions presented to this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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